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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/017,474	12/14/2001	S. Scott Friderich	KCC-16,182	5217
35844	7590	06/07/2004	EXAMINER	
PAULEY PETERSEN KINNE & ERICKSON 2800 WEST HIGGINS ROAD SUITE 365 HOFFMAN ESTATES, IL 60195			REICHLE, KARIN M	
			ART UNIT	PAPER NUMBER
			3761	

DATE MAILED: 06/07/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/017,474	<b>Applicant(s)</b> FRIDERICH ET AL.	
	<b>Examiner</b> Karin M. Reichle	<b>Art Unit</b> 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 18 March 2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) 1-14, 16, 18, 21, 23 and 25-27 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15, 17, 19, 20, 22 and 24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 14 December 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Election/Restrictions*

1. Claims 1-14, 16, 18, 21, 23, and 25-27 are still withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in Paper No. 8.

2. Contrary to Applicant's remarks on page 5, last three full paragraphs of the 3-18-04 response, claim 21 reads on the species of Figures 8-11 or the species of Figures 8-10 and 12, see the specification at page 23, line 9-page 25, line 5 and the Figures 8-12. Claim 21 remains withdrawn.

### *Specification*

#### *Drawings*

3. The drawings are objected to because in Figure 7, the lines from 22 and 36 should be dashed to denote underlying structure. Additionally, elements 22 and 36 as well as any other underlying structure (and the lines therefrom), e.g. 44, 46 and 48, should also be denoted by dashed lines in Figure 7.

A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

4. The proposed drawing changes were received on 3-18-04. These drawing changes are approved by the Examiner. Note remaining drawing objections in the preceding paragraph.

***Description***

5. The use of the trademark KRATON(R)(page 16) has been noted in this application. It should be capitalized wherever it appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

***Claim Language Interpretation***

6. The claim terminology “article”, “attached”, “bicomponent”, “bonded”, “elastomeric”, “extensible”, “containment flap”, “longitudinal”, “transverse”, “CD”, “necked” material”, “substantially continuous fibers” are defined as set forth on pages 7-14. With regard to the terminology “containment flap” also see the Response to Arguments section infra.

***Claim Rejections - 35 USC § 102***

7. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

8. Claims 15, 17, 19-20 are rejected under 35 U.S.C. 102(b) as being anticipated by Roe et al ‘866.

Claims 15 and 20: See Figure 1 and Figure 18, the article is 20, the chassis is 22, the flap is 30 or 1830 and includes elastomerics 54 for tensioning the flap in the longitudinal direction and the flap, i.e. panel 31 or 1831, is extensible in the transverse direction, see, e.g., col. 6, lines

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1-20, col. 9, line 55-col. 10, line 32 (and thereby also Freeland et al '120 at col. 14, lines 27-49, col. 15, lines 62-col. 16, line 25), col. 30, line 31-col. 31, line 2. It is noted that the terminology "low modulus of elasticity" has not been given a specific definition and thereby is considered relative. The Roe et al device is considered to have a "low modulus of elasticity".

Claim 17: see col. 6, lines 1-20, col. 9, lines 41-43, col. 24, line 10-59 (Note also definition of nonwoven and spunbonded nonwoven in Materials Handbook, 13<sup>th</sup> edition).

Claim 19: see definition of "bonded" in the Claim Language Interpretation section supra.

9. Claims 15, 17, 19-20 and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Serbiak et al '232.

Claims 15, 20 and 22: See Figure 1, col. 2, lines 17-41, col. 4, lines 50-65, col. 6, lines 4-10, col. 6, line 44-col. 7, line 10 et seq (and thereby Morman '992 at col. 5, line 57-col. 6, line 21), col. 8, lines 31-41 and col. 12, lines 24-30, i.e. the article is 8, the chassis is 22, 24, and 26 where coextensive, the flap is adjacent 40 and includes elastomerics 40 for tensioning the flap in the longitudinal direction 18 and the flap is extensible in the transverse direction 20. It is noted that the terminology "low modulus of elasticity" has not been given a specific definition and thereby is considered relative. The Roe et al device is considered to have a "low modulus of elasticity".

Claim 17: see portions cited supra (Note also definition of nonwoven and spunbonded nonwoven in Materials Handbook, 13<sup>th</sup> edition).

Claim 19: see definition of "bonded" in the Claim Language Interpretation section supra.

***Claim Rejections - 35 USC § 103***

10. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

11. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Serbiak et al in view of Morman et al '045.

Applicants claim a flap comprised of necked spunbond material having a necked spunbond nonwoven material of substantially continuous bicomponent fibers being necked to about 45% of its original width, with a basis weight of about 0.4 osy, a Young's modulus in the CD of about 3 psi/% and a hydrohead of less than about 4 mbar. The Serbiak et al reference teaches a flap comprised of necked spunbond material, i.e. the topsheet, having a necked spunbond nonwoven material of substantially continuous fibers being necked to about 45% of its original width, with a basis weight of about 0.4 osy, extensibility in the cross direction and liquid permeability, see portions cited supra. Therefore, Serbiak et al includes all the claimed structure except for bicomponent fibers and the specific modulus and hydrohead. However, see Morman '045, at col. 9, line 32-col. 10, line 20, i.e. interchangeability of polyolefin fibers and bicomponent fibers to make neckable material. To make the necked polyolefin spunbond nonwoven material of Serbiak et al necked bicomponent spunbond nonwoven material instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by Morman et al. Furthermore, the general conditions of the nonwoven material are disclosed by Serbiak et al, i.e. the topsheet material defining the flap includes extensibility in the cross direction and liquid permeability. Therefore to discover the optimum or workable extensibility in the cross direction and liquid permeability of such material for the flap of Serbiak et al, i.e.

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about 3 psi/% and 4 mbar, if the material does not already include such when tested according to the tests of the instant application, is not inventive, *In re Allen et al*, 105 USPQ 233. It is noted that the criticality of 3 psi/% or 4 mbar with respect to other extensibilities in the cross direction and liquid permeabilities of the material has not been set forth.

### *Double Patenting*

12. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

13. Claims 15, 17, and 19-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 9-19 and 21-25 of copending Application No. 10/024,634. Although the conflicting claims are not identical, they are not patentably distinct from each other because since both applications have the same effective filing date of 12-21-2000, the one way *In re Vogel* test applies, i.e. are the claims of the instant application obvious in view of the claims of the '634 application? The answer is yes. The claims of the instant application are broader than the claims of the '634 application, i.e. don't require the flap to be a breathable liquid impervious barrier material or the specifics of claims 10-11, 13, 15, 17-19 and 21-24. It is noted that spunbonded material includes continuous

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fibers (see again Materials Handbook set forth supra) and note the definition of “article” on page 7 of the instant application. In essence, once the applicant has received a patent for a species or more specific embodiment, the applicant is not entitled to a patent for the generic or broader invention. This is because the more specific “anticipates” the broader. Applicants attention is again invited to *In re Goodman*, supra.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### *Response to Arguments*

14. Applicants remarks with regard to matters of form on pages 5-6 have been considered but are either deemed moot in that the issues have not been reraised or are deemed not persuasive for the reasons set forth supra. Applicants remarks on page 7, first three full paragraphs with regard to *Roe* have been considered but are deemed narrower than the teachings of *Roe*, e.g. note the cited portions set forth in the prior art rejection supra, especially col. 30, line 31-col. 31, line 2, especially col. 30, lines 35-47. With regard to the remainder of the arguments with respect to *Serbiak*, i.e. does not teach containment flap elements “within the meaning and understanding of the art”, such arguments have been considered but are deemed nonpersuasive in that they are narrower than “the meaning and understanding in the art” and any of the claim language, i.e. the structure required by the claims is taught by *Serbiak*, i.e. the leg cuff arrangements taught thereby teach containment flaps having a free edge and an attached edge within the meaning and understanding of the art. Applicants attention is directed to the following references already of record which include similar leg cuff arrangements and such are



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considered to be flaps for containment, see Roe et al '866 at col. 9, lines 55-61, LaVon et al '649 at col. 42, lines 3-9, Buell '207 at col. 3, lines 50-55 and col. 4, lines 35-39, Buell '234 at col. 18, lines 20-27, i.e. show the structure of Serbiak are containments flaps "within the meaning and understanding of the art".

### *Conclusion*

15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (703) 308-2617. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert can be reached on (703) 308-1025. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Karin M. Reichle  
Primary Examiner  
Art Unit 3761

KMR  
June 1, 2004